

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-3349-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN BLANK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Steven D. Blank appeals an order denying his motion to correct an illegal sentence. We affirm the order.

Blank was convicted of two counts of sexual assault of a child in violation of § 948.02(2), STATS. The charges arose from several instances of sexual contact that occurred between Blank and his fifteen-year-old niece one evening when the niece was baby-sitting for Blank's daughter. Following Blank's conviction, the circuit court withheld sentence and imposed five years of probation. As a condition of probation, the court ordered Blank to spend one year in jail, with work release privileges.

Blank repeatedly violated his probation. Consequently, probation was revoked and Blank was sentenced to three years imprisonment on each of the two counts. The prison terms were to run consecutively, for a total of six years. With the assistance of counsel, Blank moved for modification of the sentence and did not appeal when that motion was denied. He subsequently brought a pro se motion pursuant to § 974.06, STATS., arguing, inter alia, that his sentence violated the constitutional guarantee against double jeopardy. Following a hearing on the motion, the circuit court denied Blank's motion. This appeal followed.

Blank argues that the circuit court erred by allowing the hearing on the § 974.06, STATS., motion to go forward while Blank was unrepresented by counsel. We reject this argument, as there is no right to appointed counsel on a § 974.06 motion. *State v. Ray*, 166 Wis.2d 855, 875 n.11, 481 N.W.2d 288, 296 (Ct. App. 1992). It appears, moreover, that Blank has waived this issue. At the motion hearing, the court specifically asked Blank if he was represented by counsel. Blank replied that he was not. He did not request representation at that time, nor did he object to the hearing going forward without counsel. For these reasons, his argument on appeal must fail.

Next, Blank suggests that the circuit court erred by permitting part of the motion hearing to be conducted off the record. Blank cites nothing in the record to support this claim, nor does he allege what it is that supposedly transpired off the record. This allegation is insufficiently developed and unsupported by the record, and we decline to review it. *See Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995).

In his motion, Blank contended that the charges and convictions on two counts of § 948.02(2), STATS., violated his constitutional guarantee against double jeopardy because, in his view, both counts arose from the same offense. He further argued that the two three-year prison sentences were illegal because they were to be served consecutively rather than concurrently, while the original terms of probation had been concurrent. The circuit court rejected both arguments, and so do we.

Although two or more acts against the same victim may occur during the same course of conduct, charges arising therefrom are not necessarily multiplicitous if the occurrences are separated by time. *State v. Saucedo*, 168 Wis.2d 486, 499-500, 485 N.W.2d 1, 6-7 (1992). As this court has observed,

One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Harrell v. State, 88 Wis.2d 546, 565, 277 N.W.2d 462, 469 (Ct. App. 1979). Analyzing *Harrell*, the supreme court echoed this view, noting that successive acts are separately punishable if a significant period of time has elapsed between acts. *State v. Eisch*, 96 Wis.2d 25, 33-34, 291 N.W.2d 800, 804-05 (1980). Whether a

defendant's convictions violate double jeopardy is a question of law upon which we owe no deference to the decision of the court below. *Sauceda*, 168 Wis.2d at 492, 485 N.W.2d at 3.

The record indicates that, in his living room, Blank committed several acts of sexual assault against his niece. He retired to his bedroom for a period of time, then returned to the living room and assaulted her further. We find that Blank had sufficient time for reflection between acts to renew his commitment to this behavior. The two charges were properly separated and individually punishable, therefore, and do not violate the guarantee against double jeopardy.

Blank's argument regarding the alleged illegality of consecutive sentences must also fail. When sentence is withheld and a defendant is convicted of multiple offenses and placed on probation, as here, consecutive sentences can be imposed upon the revocation of probation. *Smith v. State*, 85 Wis.2d 650, 659, 271 N.W.2d 20, 24 (1978).

Blank's remaining arguments address his prior motion for sentence modification, from which there was no appeal. Those issues are not properly before the court and we decline to review them.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

